No. 3418

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE KAPHAN,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

ANNETTE ABBOTT ADAMS,
United States Attorney.

FILED
FEB 24 1920
F. D. MONCKTON,
CLERK.

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BRIEF OF DEFENDANT IN ERROR.

An indictment, No. 6772 (Tr. pp. 2-6), was filed in the United States District Court in and for the Northern District of California on the 19th day of October, 1917, charging Theodore Kaphan, Harry A. Akers, Lee Yow, Rulub W. Hendricks and Presley A. McFarland with conspiring to bring into the United States and to cause to be brought into, and to aid and abet the bringing into and landing in the United States, by sea, or otherwise, through the port of San Francisco, persons not entitled to enter or remain in the United States. On the same date a second indictment, No. 6273 (Tr. pp. 7-10), was filed charging the same parties with conspiring to conceal, remove, mutilate and destroy, records,

papers and other documents filed in the United States Immigration Office at Angel Island, California. Demurrers to the said indictments having been overruled by the Court, the defendants entered pleas of "not guilty," and thereafter, to-wit, on the 12th day of November, 1918, the said indictments came on for trial, the Court having ordered them consolidated for the purposes of trial.

Before a jury was drawn, the defendants Hendricks, McFarland and Akers, by leave of Court, withdrew their pleas of "not guilty" and entered pleas of "guilty"; on motion of counsel for defendant Lee Yow a severance was granted as to the said Lee Yow, and the trial proceeded as to defendant Kaphan alone. At the conclusion of the case on November 13th, the Jury found the said defendant Kaphan guilty as charged on both indictments. Thereafter counsel for said defendant filed a motion for a new trial (Tr. p. 27) and a motion in arrest of judgment (Tr. p. 38), both of which were overruled by the Court on the 18th day of November, whereupon the Court sentenced the defendant Theodore Kaphan to imprisonment for a period of two years in the United States Penitentiary at McNeil Island on each indictment, sentences

to run concurrently. Thereafter counsel for Kaphan sued out a writ of error, the assignments of error being as follows:

1. The Court erred in overruling the demurrer interposed on behalf of said defendant, to which ruling said defendant then and there duly and regularly excepted.

2. The Court erred in denying the motion for a new trial, interposed on behalf of said defendant, to which ruling said defendant then and there duly and regularly excepted.

3. The Court erred in overruling the motion in arrest of judgment interposed on behalf of said defendant, to which ruling the defendant then and there duly and regularly excepted.

ARGUMENT.

The assignments of error are too general and indefinite. It is a well established rule, and the rule of this Court, that assignments of error must point out definitely and specifically the errors upon which an appellant relies.

Scholey v. *Rew,* 23 Wall. 331, 23 L. Ed. 99;
Lucas v. *Brooks,* 18 Wall, 436, 21 L. Ed. 637;
Bogt v. *Gassert,* 149 U. S. 17, 37 L. Ed. 637;
Hansen v. *Boyd,* 161 U. S. 397, 40 L. Ed. 746;
Matheson v. *United States,* 227 U. S. 540, 57 L. Ed. 631;
Betts v. *United States,* 132 Fed. 228;
McClendon v. *United States,* 229 Fed. 5230;
Collins v. *United States,* 219 Fed. 670;
Rule 11, Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

An assignment that the Court erred in overruling a demurrer or motion for a new trial or in arrest of judgment is too general.

> *Van Stone* v. *Stillwell, etc., Mnfg. Co,* 142 U. S. 128, 35 L. Ed. 961.

II.

The demurrers to the indictment were properly overruled. It is to be noted that each of the indictments charges a conspiracy to commit an offense against the United States, the first a conspiracy to violate the Immigration Act and the second to violate Section 128 of the United States Penal Code. Both indictments set forth the offenses in the language of the statutes and contain numerous overt acts committed by the defendants, Lew Yow, Akers, McFarland and Hendricks.

Counsel for appellant presents in his brief but one reason why the demurrer to indictment No. 6272 should have been sustained. He states (Brief p. 5) that while there is an allegation therein that McFarland abstracted official files from the Record Room at Angel Island, and gave them to Hendricks who gave them to Kaphan, that there is nothing alleged as to how Kaphan's use of same would bring or cause to be brought into the United States, Chinese persons not entitled to enter or remain in the United States.

We answer that such matter is purely evidentiary and not necessary to be pleaded in an indictment for conspiracy. It is elementary that it is not necessary that an indictment show on its face that an overt act would effect the object of the conspiracy if it is alleged that the overt act was done in pursuance of the conspiracy and to effect and accomplish the object thereof (*Houston* v. *U. S.,* 217 Fed. 852), and it is not necessary to either allege or prove an overt act against each member of the conspiracy; the conspiracy is the gist of the offense. (*Bannon* v. *U. S.,* 156 U. S. 464, 39 L. Ed. 494.)

Similar objections are urged by counsel for plaintiff in error regarding indictment No. 6273, and to such objections the same principles apply.

For the convenience of the Court, Sections 37 and 128 of the Penal Code and Section 11 of the Chinese Immigration Act follow:

Section 11, Act of May 6, 1882, as amended and added to by Act of July 5, 1884:

> "That any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall aid or abet the same, or aid or abet the landing in the United States from any vessel, of any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall on conviction thereof, be fined in a sum not exceeding one thousand dollars, and imprisoned for a term not exceeding one year."

Section 37 of the United States Penal Code:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

Section 128 of the United States Penal Code:

"Whoever shall wilfully and unlawfully conceal, remove, mutilate, obliterate, or destroy, or attempt to conceal, remove, mutilate, obliterate, or destroy, or, with intent to conceal, remove, mutilate, obliterate, destroy, or steal, shall take away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than two thousand dollars, or imprisoned not more than three years, or both."

III.

The motion for a new trial was properly denied.

In the first place, a motion for a new trial is addressed to the discretion of the Court and an order denying same is not reviewable by an appellate court.

Blitz v. *U. S.*, 153 U. S. 308, 38 L. Ed. 725;
Mattox v. *U. S.*, 146 U. S. 140, 36 L. Ed. 917;
N. Y. Central, etc., Ry. Co. v. *Fraloff*, 100 U. S. 24, 25 L. Ed. 531;
Collins v. *U. S.*, 219 Fed. 670;
Higgins v. *U. S.*, 185 Fed. 710.

But should this Honorable Court consider the matter it is obvious that the grounds of the motion did not justify the granting of a new trial to defendant. Counsel for plaintiff in error in his brief urges but one of the grounds set forth in his original motion, to-wit, that new evidence had been discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial. This alleged newly discovered evidence purports to be set forth in an affidavit of defendant Kaphan (Tr. p. 31), in which he alleges that the witness Robert F. Fergusson testified falsely in answer to questions propounded to him by counsel for defendant in that he stated that he had been offered no reward or consideration in the matter of punishment if he were "found guilty in any of these other cases"; and also in that he stated that neither the District Attorney nor anyone from the District Attorney's office had made a suggestion that a plea for leniency would be made for him in the event of his testifying in the case.

It does not appear in the affidavit of Kaphan or anywhere else in the record that Fergusson was a defendant or that any charges whatsoever were pending against him at the time that he testified; on the other hand, it appears affirmatively that he was not indicted with the defendants Kaphan, Akers, McFarland, Yee Yow and Hendricks. It does not appear from the facts that are set up in the affidavit that Fergusson had been promised immunity in consideration of his testifying in the said case, or that the letter of J. B. Densmore set forth in said affidavit (Tr. p. 32) had any reference to or bearing whatsoever upon the cases on trial; furthermore the letter itself plainly shows that the writer thereof, J. B. Densmore, was not acting for or representing the United States Attorney at the time said letter was written, and it nowhere appears that the United States Attorney even knew of the existence of the said letter. It nowhere appears how the so-called newly discovered evidence had it been known to defendant at the time of his trial would or could have affected the result of his trial; he does not even claim in his motion or in his affidavit in support thereof that it would have done so.

Fergusson was but one of several witnesses who testified for the Government, and the materiality

of his testimony is not anywhere shown in the record—for all that appears he might have been called merely to identify a record.

The case of *Heitler* v. *United States,* 244 Fed. 142, cited by counsel for plaintiff in error, bears no analogy to the present case. In that case it appears that the District Attorney did not at the beginning of the trial, indicate that two of the defendants would be used as witnesses, and did not ask severance as to them, but proceeded to trial as if said defendants were on trial with the defendant Heitler; in the present case no such situation was presented. The minutes of the Court for November 12, 1918, the day upon which the trial began, show (Tr. p. 19) that before the Jury was drawn Akers, Hendricks and McFarland pleaded "guilty" to the charges against them, that a severance was granted as to Lee Yow, and that the trial proceeded as to Kaphan alone. Neither defendant nor his counsel at any time could have believed that the co-defendants who were called as witnesses for the prosecution were, as was the case in *United States* v. *Heitler,* defending against the same charge. And it is further to be noted that even in the Heitler case, the appellate court, though expressing disapproval of the course pursued by the prosecution,

held such conduct constituted harmless error, since it did not appear that any harm to the defendant on trial resulted therefrom.

IV.

The action of the Court in denying defendant's motion in arrest of judgment was not error. Counsel for plaintiff in error presents in his brief no additional arguments in support of his motion in arrest of judgment and may therefore be presumed to have abandoned any points raised therein which were not raised in the demurrer or the motion for a new trial.

It is respectfully submitted that the judgment of the trial court should be affirmed.

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ANNETTE ABBOTT ADAMS,
United States Attorney,
Attorney for Defendant in Error.